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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of	)	
	)	
Policies and Rules for the Direct Broadcast Satellite Service	)	IB Docket 98-21
	)	
	)	

TO THE COMMISSION:

COMMENTS OF THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST AND CONSUMERS UNION

The Office of Communication of the United Church of Christ and Consumers Union ("*UCC, et. al*") respectfully submit these comments in response to the FCC's February 19, 1998 *Notice of Proposed Rulemaking* ("*NOPR*") proposing to consolidate Parts 25 and 100 of its rules.

UCC, *et al.* support the goal of rationalizing the Commission's rules. They agree that most of the proposed revisions would facilitate effective administration of the Communications Act. However, there are two major aspects of the proposal which UCC, *et al.* do not support:

First, UCC, et. al see little reason for a blanket prohibition of cable/DBS cross-ownership.

Second, and more importantly, the NOPR could be read as ratifying the International Bureau's erroneous decision on the initial licensing of DBS applicants, and implicitly extending it to terrestrial broadcasting. In proposing to relocate and retain 47 CFR 100.11(g), the NOPR would condone the Bureau's failure to distinguish the regulatory treatment of applicants for DBS service from existing DBS licensees. This could allow applicants proposing to operate "non-broadcast" service to be licensed without regard to Commission foreign ownership and character policy. As UCC, et. al has shown in other pending proceedings, this is an erroneous reinterpretation of the Communications Act and numerous decisions of the Commission and the International Bureau itself. The new policy would apply equally to terrestrial TV and radio licenses. Under the Bureau's radical plan:

- ***Saddam Hussein - or agents acting on his behalf - could interfere with American democracy by determining which candidates for public office are entitled to "reasonable access" and "equal time" on TV stations or DBS satellites.***
- ***A wealthy investment banker convicted of securities fraud could apply for and operate broadcasting or DBS licenses from her jail cell.***
- ***A convicted pederast could obtain a radio station by proposing a subscription format, and then convert to an advertising-supported format directed at teenagers.***
- ***Anti-trust violators and perjurers could buy DBS or broadcast properties.***

This is a shocking posture if it is intentional, and a horrifying one if it is not.

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The Commission must end the confusion caused by the International Bureau's *MCI* decision discussed below. The International Bureau has misused the policy adopted in the Commission's 1987 *Subscription Video* decision, *Subscription Video Services, aff'd. sub nom. NABB v. FCC*, 849 F.2d 655 (D.C. Cir. 1988).[1] That decision adopted a policy of forbearance from applying broadcast ***content*** regulation to existing licensees which choose to ***convert*** to subscription-based services. UCC, *et al.* believe the *Subscription Video* decision was misguided and should be overruled,[2] but until the International Bureau issued its non-final *MCI* decision discussed below, *Subscription Video* has never before been applied to ***new applicants*** for broadcast or DBS licenses. Nor has it been used to exempt applicants or licensees from the duty to first establish and maintain their basic citizenship, financial and other qualifications. Moreover, *Subscription Video* has been effectively overruled as to DBS, since Congress has recently specified that all DBS operators (including those operating on a subscription basis) will be subjected to certain broadcast-type content requirements.

For these and other reasons set forth below, the Commission should clarify its revised

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[1]The National Association for Better Broadcasting ("NABB") has participated with UCC and Consumers Union in related proceedings on DBS, and has long opposed the policy embodied in the *Subscription Video* decision. Time limitations have precluded NABB's participation in these comments. However, it is expected that NABB will join them once it has an opportunity to review this text.

[2]The *Subscription Video* decision was grounded in the then-incumbent FCC's hostility to regulating broadcasters under trusteeship principles. *See, Subscription Video Services (Notice of Proposed Rulemaking)*, 51 Fed.Reg. 1817 (1985). However, the Commission has in recent years taken a different approach. In defending the constitutionality of the DBS provisions of the 1992 Cable Act, for example, the Commission argued to the U.S. Court of Appeals that "There are no relevant First Amendment differences between DBS and traditional broadcasting, both of which involve the exclusive use of scarce and valuable portions of the public domain." *Government's Response to Petitions for Rehearing and Suggestions For Rehearing En Banc*, December 18, 1996, *Time Warner Entertainment Company, LP v. FCC* (No. 93-5349)(D.C. Cir.).

and relocated version of 47 CFR §100.11(g) by adding language specifying that all DBS applicants must establish their basic qualifications as broadcast licensees. This would reestablish the International Bureau's longstanding interpretation of that provision and bring it into line with all prior actions implementing the *Subscription Video* policy.[3]

CROSS-OWNERSHIP

A major basis of UCC, *et al.*'s opposition to the proposed MCI-PRIMESTAR assignment[4] is that the assignee in that case, which is owned and controlled by the largest cable MSO's, will misuse its proposed purchase of a high-power DBS licensee to impede the growth of DBS competition. Notwithstanding the seemingly inherent anti-competitive impact of cable/DBS cross-ownership, UCC, *et al.* see little reason to adopt a blanket rule prohibiting such cross-ownership. Given the small number of orbital slots there is a possibility, however slight, that development of meaningful MVPD competition may justify cable/DBS cross-ownership at some point in the future. UCC, *et al.* thus agree, albeit for different reasons, with Commissioners Furchgott-Roth and Powell that it is unnecessary to adopt a specific cable/DBS cross-ownership rule.

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[3]There is another shortcoming in the *NOPR*. The Commission's Initial Regulatory Flexibility Analysis determines, at ¶4, that since "[s]mall businesses do not have the financial ability to become DBS licensees,...we do not believe that small entitles will be impacted by the rulemaking." While the factual premise is correct, the legal conclusion is dubious. Cable/DBS cross-ownership indubitably impacts small cable operators. Indeed, the Small Cable Business Association courageously challenged the proposed MCI-PRIMESTAR assignment precisely because this cable/DBS combination would enable large MSO's to use their DBS service anti-competitively. To give but one example, PRIMESTAR's "Cable Plus" service would bundle basic cable and DBS service. Failure to offer that marketing opportunity to small cable operators at a competitive price, and similar marketing devices, would adversely affect small business.

[4]MCI has proposed to assign its DBS license to PRIMESTAR, an existing DBS licensee owned by cable MSO's. UCC, *et al.* have filed several *Petitions to Deny* opposing Commission approval of several aspects of the transaction.

BROADCAST APPLICANTS' QUALIFICATIONS

UCC, *et al.* have addressed at length their disagreement with the International Bureau's *MCI* decision, *MCI Telecommunications Corp.* 11 FCCRcd 11265 (IB 1996), in which it overruled its own prior decisions to hold that it need not consider an applicant's qualifications to be a Title III broadcast licensee where an applicant claims that it intends to offer a "non-broadcast" service. Their pending *Application for Review* of the *MCI* decision, and their pending *Petitions to Deny* the MCI's application to assign its non-final DBS authorization and the associated PRIMESTAR "roll up" proceeding each describe flaws in the International Bureau's position. In addition, a powerful argument against the International Bureau's decision came from PRIMESTAR itself. PRIMESTAR initially opposed grant of MCI's DBS application. PRIMESTAR later withdrew after PRIMESTAR's cable MSO ownership exercised their market power to force MCI and its partner, The News Corporation Ltd., to abandon a competitive service and instead to seek to sell the MCI license to PRIMESTAR. (UCC, *et al.* appended PRIMESTAR's January 6, 1997 *Application for Review* as Attachment B to their September 25, 1997 *Petition to Deny* the MCI-PRIMESTAR assignment.)

By conspicuous omission, the International Bureau and now, in the *NOPR*, the Commission, speak of the regulatory status of "non-broadcast" DBS operators exclusively in terms of foreign ownership, *i.e.*, whether the intention to operate a "non-broadcast" subscription service relieves an applicant from complying with the foreign ownership provisions of Section 310(b) of the Communications Act. However, as UCC, *et al.* have repeatedly pointed out, there are several other extremely important statutory standards which apply exclusively to broadcast licensees. Under Section 310(b) the Commission must determine that every DBS applicant is qualified to be a licensee, not just with respect to the nationality of its owners, *but also* with respect to the other threshold criteria which are required of broadcast licensees. These include, *inter alia,* financial qualifications[5] and character. *See,* 47 U.S.C. §308(b); *see also, Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC2d 1179 (1985), *recon. granted*

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[5]UCC, *et al.* note in this regard that it is highly questionable for the Commission to assume that the use of auction processes for the selection of DBS licensees obviates the need to scrutinize financial qualifications. *NOPR*, ¶22. Suffice it to say that not every winning bidder in FCC spectrum auction has proven to be financially qualified.

in part, denied in part, 1 FCCRcd 421 (1986). They also impose restrictions on applicants which have been found to have violated anti-trust laws, *see* 47 USC §313; *see also*, 47 USC §§317, 318, 325, 503(b), 508 and 509. The failure to apply these statutory criteria to all DBS applicants without regard to their subsequent programming plans opens the door to all who could not or would not wish to establish their honesty, record for veracity or character before being found qualified to be an FCC licensee.

The Commission's decision is a complete departure from prior practice. From the very inception of the DBS service, the Commission always required DBS applicants to establish their qualifications as Title III licensees regardless of whether they expressed an intention to provide an advertiser-supported or subscription service. This policy continued long after the Commission issued its *Subscription Video* order declaring that licensees converting to subscription service would no longer be subject to Title III content regulation.

It is impossible to read the *Subscription Video* decision as governing an applicant's ***threshold*** qualifications as opposed to the mere forbearance from subsequent ***content*** regulation. There is not a word in any Commission pronouncement which the International Bureau could have cited to the contrary. Indeed, the core statement of the Commission's intention in that proceeding is as follows:

> [W]e believe that all subscription radio and television services should be treated alike from the point of view of the Commission's regulations governing program ***content***....[W]e take up only DBS and STV, the two subscription services covered by broadcast ***content*** regulation. We note that ***content*** regulation has never been considered appropriate for nonbroadcast subscription services....

Subscription Video Services (Notice of Proposed Rulemaking), supra, 51 Fed.Reg. at 1823. The Mass Media Bureau policy is to review subscription TV licensees' character and other qualifications notwithstanding the non-broadcast nature of their program service. *See, Video 44*, 6 FCCRcd 4948 (1991). In 47 CFR Part 21, the Commission has expressly applied foreign ownership restrictions to MMDS non-common carrier, subscription services, the service "most directly analogous" to DBS. *Report and Order (Docket 80-603),* 51 RR2d 1341, 1367 (1982).

Past DBS practice has been consistent in this regard as well. For example, in *TEMPO Satellite, Inc.*, 7 FCCRcd 2728 (1991), even though the applicant went to great lengths to

emphasize to the Commission that it intended to offer a "non-broadcast" service,[6] the Commission staff conducted a months-long extensive inquiry into the applicant's past record of anti-trust violations before concluding that it had demonstrated its character was sufficient to permit it to serve as a Commission broadcast licensee.

In numerous subsequent decisions, the International Bureau has repeatedly reviewed applications under strict broadcast standards even though it had expressed its intention to provide a "non-broadcast" service. Of particular note in this regard is *Continental Satellite Corporation*, 10 FCCRcd 10473 (IB 1995). The International Bureau cannot distinguish that decision; instead, it can offer the lame - and legally inadequate - explanation that the action relied on a "mistakenly" made assumption that Section 310(b) was applicable. *MCI Telecommunications Corp.*, 11 FCCRcd at 11286. So much for *stare decisis*.

Finally, and most importantly, the 1992 Cable Act absolutely requires the Commission to treat DBS applicants as broadcasters. In enacting 47 USC §335(a), Congress specifically applied the political and public interest requirements of Sections 312(a)(7) and 315 to DBS. These are the most sensitive of all broadcast programming requirements. In directing that these provisions apply to *all* DBS operators, Congress effectively overruled the Commission's determination to forbear from all content regulation of DBS. Even if that were not so, there is no way to reconcile Section 335(a) with the proposal to allow DBS licenses to be awarded without scrutinizing applicants' character, financial and other qualifications. Congress could not possibly have intended to permit aliens, convicts, perverts and perjurers to determine who is a legally qualified candidate, who is entitled to "equal time" and to apply other public interest programming judgments.

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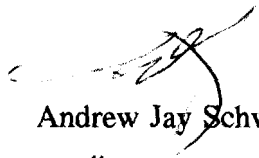
[6]*See, e.g, Petition for Reconsideration and Clarification on Docket DBS 88-04*, September 14, 1989, p. 4, n.1.

CONCLUSION

Wherefore, the Commission should adopt its proposals, as modified in accordance with the suggestions and arguments contained in these comments.

Respectfully submitted,



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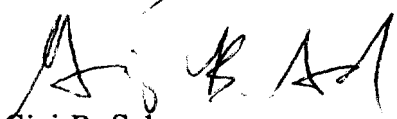

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